IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JORGE RUIZ SANTA CRUZ, Appellant.	)	2 CA-CR 2006-0074 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20042234

Honorable Howard Hantman, Judge

AFFIRMED AS MODIFIED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Alan L. Amann
Tucson
Attorneys for Appellee

Law Offices of Thomas Jacobs
By Thomas Jacobs
Tucson
Attorneys for Appellant

H O W A R D, Presiding Judge.

¶1 After a jury trial, appellant Jorge Ruiz Santa Cruz was convicted of prohibited possession of a deadly weapon and sentenced to 4.5 years in prison. On appeal, he contends the trial court erred by denying his motion to suppress, by refusing to allow him to introduce evidence that another person present when Santa Cruz was arrested had invoked his right to remain silent, and by giving the *Portillo*[1] instruction. Because the trial court properly decided these issues, we affirm.

Facts and Procedural Background

¶2 We view the facts in the light most favorable to upholding the conviction. *See State v. Cox*, 214 Ariz. 518, ¶ 2, 155 P.3d 357, 358 (App. 2007). Santa Cruz was a passenger in a truck that a police officer stopped for a traffic violation. During a search of the truck, the officer found two guns. Santa Cruz ultimately admitted that one of the guns was his and that he was not permitted to have it because he had been convicted of a felony. A jury found Santa Cruz guilty of prohibited possession of a deadly weapon, and the trial court sentenced him to an enhanced, presumptive, 4.5-year prison term.

Motion to Suppress

¶3 On appeal, Santa Cruz first argues that the trial court erred in denying his motion to suppress evidence for lack of reasonable suspicion to stop the vehicle in which he was a passenger. In reviewing the trial court's denial of a motion to suppress, "we consider only the evidence presented at the suppression hearing and view that evidence and

[1]*State v. Portillo*, 182 Ariz. 592, 898 P.2d 970 (1995).

reasonable inferences therefrom in the light most favorable to upholding the [trial] court's ruling." *State v. May*, 210 Ariz. 452, ¶ 4, 112 P.3d 39, 41 (App. 2005).

¶4 Late one night, a police officer was parked at a convenience store when he heard "yelling" coming from vehicles stopped at a nearby intersection. After the traffic light turned green, the officer saw the two vehicles accelerate. One of them, a white truck, spun its tires and moved from side to side as it sped away. The officer pursued the vehicles and stopped the white truck for exhibition of speed.

¶5 Santa Cruz moved to suppress a gun found in the truck and his statements admitting ownership of the gun, claiming the officer did not have reasonable suspicion to believe the driver had committed exhibition of speed.[2] In reviewing the trial court's denial of a motion to suppress, we uphold the court's factual findings so long as they are supported by the record and not clearly erroneous, but we review questions of law de novo. *May*, 210 Ariz. 452, ¶ 4, 112 P.3d at 41.

¶6 The officer stopped the driver of the truck for violating A.R.S. § 28-708(A), which states: "A person shall not drive a vehicle or participate in any manner in a race, speed competition or contest, drag race or acceleration contest, test of physical endurance or exhibition of speed or acceleration or for the purpose of making a speed record on a street

---

[2]The state has not contested that Santa Cruz, as a passenger, had standing to challenge the stop of the truck and seizure of the evidence. *See Brendlin v. California*, ___ U.S.___, 127 S. Ct. 2400, 2403 (2007); *State v. Gomez*, 198 Ariz. 61, ¶ 6, 6 P.3d 765, 766 (App. 2000). Therefore, we will not consider the issue of standing here. *See State v. Riley*, 196 Ariz. 40, n.1, 992 P.2d 1135, 1139 n.1 (App. 1999).

or highway." Exhibition of speed or acceleration means "quick acceleration of a vehicle for the purpose of drawing public attention to the swiftness of one's vehicle." *State v. McMahon*, 201 Ariz. 548, ¶ 11, 38 P.3d 1213, 1216 (App. 2002).

¶7 The officer testified the two vehicles here were stopped side by side at a traffic light and "yelling" came from one of the vehicles. When the light turned green, both vehicles accelerated, and the truck in which Santa Cruz was riding accelerated fast enough for its tires to spin and squeal and for the truck to swerve. This evidence supports a reasonable suspicion that the driver had quickly accelerated to call attention to his vehicle's swiftness and thus had engaged in an "exhibition of speed or acceleration." § 28-708(A). The trial court, therefore, did not abuse its discretion in denying the motion to suppress.

¶8 Santa Cruz contends, however, that the trial court erred because neither vehicle had exceeded the speed limit or engaged in a speed contest or actually raced. But A.R.S. § 28-708 describes the prohibited acts in the disjunctive. If the truck engaged in an "exhibition of speed or acceleration," it is irrelevant whether it also exceeded the speed limit, engaged in a speed contest, or raced. *See McMahon*, 201 Ariz. 548, ¶ 11, 38 P.3d at 1216.

Driver's Right to Remain Silent

¶9 Santa Cruz next argues the trial court erred by refusing to allow him to present evidence that the driver of the truck had invoked his right to remain silent when questioned about the ownership of the weapons. We will reverse a trial court's ruling on the

admissibility of evidence only for a clear abuse of discretion and resulting prejudice. *State v. Ayala*, 178 Ariz. 385, 387, 873 P.2d 1307, 1309 (App. 1994). "The prejudice must be sufficient to create a reasonable doubt about whether the verdict might have been different had the error not been committed." *Id.*

¶10 The relevant evidence at trial was essentially undisputed. The truck was occupied by three individuals: Juan B., the driver; Francisco F., sitting in the back seat; and appellant Santa Cruz, sitting in the front passenger seat. Francisco was arrested on a warrant. The officer asked Santa Cruz and Juan to step out of the vehicle while the officer searched it. During the search, the officer found two handguns concealed under a drink holder in the center console. The officer then detained and handcuffed both Santa Cruz and Juan.

¶11 During the traffic stop, Juan invoked his right to remain silent. At trial, Santa Cruz sought to elicit testimony from the officer that Juan had not provided any information to the officers about the guns found in the truck. Santa Cruz's intent was to try to raise an inference that the guns belonged to Juan.

¶12 We need not decide whether the trial court erred in precluding the evidence concerning the driver's invocation of his right to remain silent because we conclude that Santa Cruz suffered no prejudice. *See id.* The state produced evidence that Santa Cruz was a passenger in a truck in which two guns were concealed. Santa Cruz initially stated that he did not know about the guns and that he was prohibited from possessing a gun.

Subsequently, Santa Cruz admitted he had purchased and owned one of the guns and correctly identified the color and caliber of the gun. He later told another officer he was going to jail because he was not supposed to have a gun. And finally, in a taped interview, he admitted he owned and had purchased the gun, purportedly for hunting purposes. Santa Cruz did not deny having made these statements but argued in closing that he had lied. In view of the overwhelming evidence of Santa Cruz's guilt, we conclude beyond a reasonable doubt that evidence of the driver's invocation of his right to remain silent would not have changed the jury's verdict. *See id.*; *see also State v. Villa*, 179 Ariz. 486, 488, 880 P.2d 706, 708 (App. 1994). Therefore, we find no reversible error.

Portillo **Instruction**

¶13 Finally, Santa Cruz argues the trial court erred by giving the *Portillo* instruction. The supreme court, as Santa Cruz acknowledges, has repeatedly rejected similar arguments challenging this instruction. *State v. Ellison*, 213 Ariz. 116, ¶ 63, 140 P.3d 899, 916, *cert. denied*, ___ U.S. ___, 127 S. Ct. 506 (2006); *State v. Dann*, 205 Ariz. 557, ¶ 74, 74 P.3d 231, 249-50 (2003); *State v. Lamar*, 205 Ariz. 431, ¶ 49, 72 P.3d 831, 841 (2003). Because we have no authority to overrule the supreme court, *City of Phoenix v. Leroy's Liquors, Inc.*, 177 Ariz. 375, 378, 868 P.2d 958, 961 (App. 1993), we must reject this claim.

Conclusion

¶14 For the foregoing reasons, Santa Cruz's conviction and sentence are affirmed. We note that the sentencing minute entry erroneously classifies the offense as "nonrepetitive," although it properly lists the presumptive, enhanced prison term of 4.5 years. *See* A.R.S. § 13-604(A). Accordingly, we modify the sentencing minute entry to classify the offense as "repetitive," *see State v. Jonas*, 164 Ariz. 242, 245 n.1, 792 P.2d 705, 708 n.1 (1990), and we affirm the sentence as modified.

_____
JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

_____
JOHN PELANDER, Chief Judge

_____
J. WILLIAM BRAMMER, JR., Judge